In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-312

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

DAVID WARE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the First Appellate District

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INDEX

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The petitioner, Merrill Lynch, Pierce, Fenner & Smith, Inc., respectfully prays that a writ of certiorari issue to review the opinion and order of the Court of Appeal of the State of California for the First Appellate District entered in this proceeding on March 15, 1972.

OPINION BELOW

The opinion of the Court of Appeal is reported at 24 Cal.App.3d 35, 100 Cal.Rptr. 791 (1972), and a copy of the opinion appears as Appendix A hereto. No opinion was rendered by the Superior Court of the State of California, in and for the City and County of San Francisco.

JURISDICTION

The decree of the Court of Appeal for the First Appellate District affirming the order denying arbitration was entered on March 15, 1972. A timely petition for hearing in the California Supreme Court was denied on May 10, 1972.

On August 3, 1972, Mr. Justice Douglas signed an order extending the time for filing this petition for certiorari to and including August 23, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does a state law permitting actions for wages to be maintained without regard to private arbitration agreements offend federal law when it is applied to deny arbitration between an employer and former employee when there exists between them a written arbitration agreement required by the Rules and Constitution of the New York Stock Exchange which are promulgated as part of the federal self-regulatory scheme authorized by Congress in section 6 of the Securities Exchange Act of 1934?

2. Does the application of state antitrust law declaring that any contract by which a person is restrained from engaging in a lawful occupation is void to a provision in a profit-sharing plan of a national securities dealer which provides for forfeiture of vested interests if an employee voluntarily terminates his employment and is employed by a competitor constitute an impermissible burden on interstate commerce where the employer is engaged in interstate commerce in a federally regulated industry generally exempt from the application of federal antitrust laws, where the plan operates in interstate commerce, and where the provision is valid under the laws of other states and the laws of the United States?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15:

> § *78f. Registration of national securities exchanges.* (a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the

Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents below specified:

* * *

(2) Such data as to its organization, rules or procedure, and membership . . .

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange;" . . .

* * *

(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

California Business & Professions Code

§ *16600. Invalidity of Contracts.*

Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.

California Labor Code

§ *229. Actions to enforce payment of wages; effect of arbitration agreements.*

Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate . . . .

STATEMENT OF THE CASE

Respondent, a former employee of Merrill Lynch, filed an action on behalf of himself and other former California employees who had voluntarily terminated employment with petitioner and entered into employment with Merrill Lynch's competitors. He sought declaratory relief and damages, alleging that a provision of Merrill Lynch's profit-sharing plan was invalid under California Business & Professions Code § 16600. The plan provides that an employee who voluntarily terminates his employment and enters into an employment relationship with a competing stockbroker loses his vested interest in the plan. Section 16600 of the Business and Professions Code makes void any contract by which an individual is restrained from engaging in a lawful occupation. (Appendix A, pp. 1-4.)

Merrill Lynch answered and raised various defenses, including a defense that application of California law deprived it of the benefits of due process and equal protection under the laws and Constitution of the United States, that its plan operated on an interstate basis, and that the forfeiture provision was valid under federal and New York law, the latter being a choice-of-law provision in the plan, 1 R. 60. It also petitioned for an order compelling arbitration on the basis of a written agreement between it and its former employee, and all other former employee members of the class. The arbitration agreement is contained in a Form RE 1 of the New York Stock Exchange, of which Merrill Lynch is a member. Rule 345 of the Exchange, promulgated pursuant to section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f, requires registration of all persons employed as registered representatives, as were respondent and his class. Appendix B. Rule 347(b) and the Constitution of the Exchange, also promulgated under the same statute, require arbitration of employment disputes between member firms and their employees. Appendix

B. These points were raised in the trial court in a memorandum in support of the petition to compel arbitration and in a reply memorandum to respondent's opposition. 1 R. 135-37. Respondent opposed arbitration on the grounds that no contract existed, that if it did, it was adhesory in nature, and that, in any event, since section 16600 made the forfeiture provision illegal, he could not be required to arbitrate an illegal subject matter under California law. He also moved to determine the action be maintained as a class action. No factual disputes existed which are relevant to this petition. The trial court, by minute order, granted the class action motion and denied the petition to compel arbitration. 1 R. 194. It did not state any ground for the latter action even though requested to make findings of fact and conclusions of law. 1 R. 201. Merrill Lynch appealed that order.

On appeal, and without benefit of findings of fact or conclusions of law, Merrill Lynch challenged the order on all possible grounds, both state and federal. 2 R., Exhibit A. With respect to federal grounds, it contended that the self-regulatory scheme imposed by federal law in the Securities Exchange Act of 1934, including its delegation of authority to the Exchange and the Exchange's promulgation of the arbitration rule, was paramount to the exclusion of state law, 2 R., Exhibit A, pp. 33-35, 50, that state antitrust law could not be applied where interstate commerce was affected, 2 R., Exhibit G, pp. 51-55, and that federal comity required state law to yield to federal supremacy in the antitrust and securities areas in order to achieve equitable and uniform application of federal arbitration policies, 2 R., Exhibit A, p. 55.

On appeal the former employee for the first time asserted the bar of Labor Code § 229. 2 R., Exhibit B, pp. 30-31. After argument the court requested additional briefing, 2 R., Exhibit D, including the application of Labor Code

§ 229. Merrill Lynch referred the court to its brief filed in the companion case[1] as to the latter point. 2 R., Exhibit E.

The Court of Appeal, although agreeing a valid arbitration contract existed, rejected these contentions without discussion, and relied primarily on Business & Professions Code § 16600 and California Labor Code § 229 which provides that actions for wages—the court equated profit-sharing benefits with wages—can be maintained without regard to arbitration agreements, Appendix 10-14. It affirmed the order of the trial court and remitted the action for trial.

These contentions were again raised in a timely petition for hearing in the California Supreme Court. 2 R., Exhibit G. In addition, Merrill Lynch asserted that "the same supremacy required of section 301 [29 U.S.C. § 185(a)] of the Labor Management Relations Act . . . ought to prevail to the exclusion of the applicability of Labor Code § 229." 2 R., Exhibit G, pp. 4-12. The California Supreme Court refused to hear these contentions. 2 R., Exhibit I.[2]

REASONS FOR GRANTING THE WRIT

1. The Decision Below Undermines the Congressional Policy of Self-Regulation Contained in the Securities Exchange Act of 1934.

The securities industry, like industrial labor, is highly regulated. In addition to direct legislation, Congress created federal regulation through a federal regulatory agency, the Securities and Exchange Commission, and

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1. Some five months earlier the same division of the Court of Appeal had reversed an identical order denying arbitration in an action brought by another employee against petitioner. Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal.App.3d 668, 97 Cal.Rptr. 811 (1st Dist. 1971). Appendix C. The facts are identical and that employee, ostensibly a member of the class here, was ordered to arbitrate. Labor Code § 229 was also raised on appeal there but not applied nor discussed in the court's opinion.

2. It also refused to resolve the direct conflict in opinions of the same Court of Appeal. *See* note 1, *supra*.

established a statutory scheme of supervised self regulation by stock exchanges, such as the New York Stock Exchange. Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f, requires registration of national securities exchanges, and the enforcement of rules and by-laws promulgated by them. This self regulatory aspect of the securities industry, carried out by the New York Stock Exchange, is of utmost importance to the fulfillment of the statutory scheme of self-regulation.

The exchanges have responded to the self-regulatory scheme by promulgating rules under section 6 governing the conduct of member firms, such as Merrill Lynch, and employees of member firms, such as respondent. In accordance with this policy of self-regulation, rule 345 of the New York Stock Exchange requires the registration and approval of any person employed by a member firm in the capacity of a registered representative. Appendix B. In consideration of that employment and registration, Rule 347(b) requires all disputes arising out of that employment relationship or its termination be arbitrated. *Ibid.* These, and other substantial regulations are all incorporated in the RE-1 Form. 1 R. 64-67. The purpose of the rules is to insure compliance with the Congressional directive that such rules be "just and adequate to insure fair dealing and to protect investors. . . ." 15 U.S.C. § 78f(d). Rules and regulations which impose stringent obligations on member firms' employees dealing directly with the public are designed to effectuate that purpose. The arbitration rules, like other rules of conduct for member firms and their employees, are an integral part of industry self-regulation which Congress sought to achieve, and do not derogate from the principle of insuring fair dealing to protect investors.

The application of California Labor Code § 229 defeats that very objective and renders the Exchange rules a nul-

lity. The court below did not disagree that the RE-1 form constituted an otherwise valid and binding arbitration agreement. Appendix A, p. 6. It did, however, refuse to give effect to it although arbitration has consistently been the remedy enforced by federal courts in disputes between member firms, *e.g., Brown v. Gilligan, Will & Co.*, 287 F.Supp. 776 (S.D.N.Y. 1968), between member firms and non-member firms, *e.g., Axelrod & Co. v. Kordich, Victor & Neufeld*, 451 F.2d 838 (2d Cir. 1971), and between member firms and employees, *e.g., Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971). The court here, Appendix p. 9, paraphrased the *Dickstein* rationale, 443 F.2d at 783, but refused to apply the arbitration rule of the Exchange even though it bore the implied approval of federal law.

The result reached here has an analogy to federal labor law. In that context, where an employer is engaged in interstate commerce, the issue of arbitrability of a dispute must be resolved by application of federal substantive law fashioned by federal courts under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In such a case "incompatible doctrines of local law must give way to principles of federal labor law," *Local 174 Teamsters, etc. v. Lucas Flour Co.*, 369 U.S. 95, 98 (1962). The opinion here is in conflict with that doctrine. The principles of federal securities law require arbitration even in the face of more substantive statutes (*i.e.*, federal antitrust laws) than Labor Code § 229, *e.g., Dickstein v. DuPont, supra.* The purpose of arbitration is to keep disputes out of court, a purpose entirely consistent with the self-regulatory grant. *Compare Coenen v. R. W. Pressprich Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972).

Although the Securities Exchange Act of 1934 does not itself command arbitration as does the Labor Management Relations Act, Congress expressly authorized national securities exchanges to promulgate rules and regulations

in accordance with the Act. By such authorization, and by the adoption of such rules to effectuate the self-regulatory grant, the arbitration rules of the Exchange, embodied in the agreement between Merrill Lynch and its employee have the same force and effect as federal law and must be followed.

Self-regulation is thwarted by the possibility that arbitration may or may not be permitted under the laws of different states. Here, for example, New York law contains provisions relating to wages but no law comparable to California Labor Code § 229, *e.g.*, New York Labor Law § 198 (McKinney 1971 Supp.) Thus, the Exchange rule is entirely consistent with 15 U.S.C. § 78F(c). The possibility of conflicting interpretation, as here, may stimulate judicial disputes and impede resolution of conflicts by other means. Lack of uniform treatment makes the need for uniformity in this area particularly compelling. Such uniformity can only come by permitting the self-regulatory arbitration provisions of the Exchange to prevail over inconsistent local laws and thereby fulfill the Congressional objectives.

2. The Decision Below Presents an Important Question of Whether a State Antitrust Law or Non-Arbitration Law May Be Applied Where in Similar Situations, Because of the Preemptive Nature of the Self-Regulation Purposes of the Federal Securities Laws, Federal Courts Have Refused to Apply Federal Antitrust Laws to Rules of Exchanges and Their Members.

Where a regulation or rule of a national stock exchange is an instance of self-regulation falling within the scope and purpose of the Congressional purpose in the federal securities law, no action founded on alleged federal antitrust laws, or to avoid arbitration, is allowed since to do so derogates from the purpose and effectiveness of self-regulation, *e.g.*, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Dickstein v. DuPont*, 343 F.2d 783 (1st

Cir. 1971). Since federal antitrust law is to a certain extent subservient to the self-regulatory provisions of the Exchange, state antitrust law should be also. And even if the alleged antitrust violation is not the type immunized by self-regulation, *e.g., Silver v. New York Stock Exchange, supra* at 371 n. 5 (Mr. Justice Stewart dissenting), that does not affect the fact that the preemptive nature of federal securities laws requires that the arbitration rules be enforced.

Federal courts have consistently upheld these arbitration rules in the face of challenges under federal antitrust laws to the conduct or acts or rules sought to be arbitrated, *e.g., Coenen v. R. W. Pressprich Co., supra* at 1211. *Coenen*, the most recent federal decision on point, summarizes that federal policy and the cases articulating it. *Coenen* involved the issue of arbitration under the Exchange Constitution and rules where a claim was made that the challenged conduct violated the federal antitrust laws. Relying upon the liberal arbitration policies and the purposes of the arbitration rules, the court concluded that these policies were entirely consistent with the Congressional grant to the Exchange.

If federal antitrust law cannot overcome the federal policy of self-regulation, neither can similar state laws. Certainly it is inconsistent to permit that federal policy to override other federal laws but not state laws such as Labor Code § 229 or Business & Professions Code § 16600. To rely on state law and refuse arbitration, as the court did here, frustrates the policy by making Merrill Lynch and its employees settle their disputes in court. It does not frustrate the overall feature of the securities laws which are designed to protect investors. On the contrary this dispute is between a member and its employees. It is, in this context, very similar to disputes between members, since it involves the business conduct of member firms on an internal basis, as distinguished from the conduct of a member

vis-a-vis a public investor. *Cf. Wilko v. Swan*, 346 U.S. 427 (1953). Moreover, it is a rule which lies at the heart of the registration process designed to screen those employees of member firms dealing with the public to insure the required protection of the investor.

The arbitration rule is precisely the kind of self-regulatory provision called for in the 1934 Act. It clearly furthers the Act, as has been recognized in those federal cases in which similar issues are raised. Whether or not, given that federal policy, a state law should be permitted to defeat that aspect of self-regulation, is an important issue which calls for resolution. It affects not only Merrill Lynch, but all member firms of national securities exchanges in the resolution of claims by their employees arising out of that employment relationship.

3. The Decision Below Failed to Give Recognition to Settled Principles of Law Prohibiting Application of State Antitrust Laws to Activities in Interstate Commerce Particularly Where Those Same Acts Do Not Constitute Federal Antitrust Violations and Uniformity of Application Is Desirable and Equitable.

The court below, relying on a decision of the California Supreme Court holding a similar provision in a pension plan to violate the state antitrust laws, *Muggill v. Reuben Donnelley Corp.*, 62 Cal.2d 239, 42 Cal. Rptr. 107 (1965), held the Merrill Lynch provision invalid. That holding is an unwarranted application of state law. This past Term this Court summarily indicated its approval of a long-standing rule of law that state antitrust laws cannot be applied where they are in conflict with federal policy, where national uniformity is required and where the state's regulatory interest is outweighed by the burden on interstate commerce, *Flood v. Kuhn*, ... U.S. ...., ..., 92 S.Ct. 2099, 2113 (1972). Flood had challenged baseball's reserve clause not only on the basis of federal antitrust law but on various states' laws including the very section here in question, *Flood v. Kuhn*, 316 F.Supp. 271, 272 (S.D.N.Y. 1970).

The following facts succinctly point out the need for uniformity here:

1. Merrill Lynch's profit sharing plan operates on a national and international level, open to all eligible employees of Merrill Lynch wherever located, 1 R. 59-60;

2. Except for California, Michigan and Virginia, those states which have considered the legality of a similar provision under state antitrust laws, have found it *not* to be in violation of those laws. *See* ANNOT., 18 A.L.R.3d 1246 (1968);

3. Respondent here, although alleging he was restrained from entering into competition, in fact, was not since the clause only applies to employees who actually are employed by a Merrill Lynch competitor. 1 R. 4;

4. Merrill Lynch employees are engaged in interstate commerce and their activities affect interstate commerce and contemplate use of the facilities of interstate commerce;

5. Similar provisions do not constitute violations of the federal antitrust laws, *e.g., Austin v. House of Vision*, 404 F.2d 401 (7th Cir. 1969.

The employment was interstate in nature, as is Merrill Lynch's business. As such it is susceptible to differing state regulation that, as applied here, requires it to comply with the strictest standard in order to continue its plan in present form. The thrust of the court's decision is that Merrill Lynch may still have a uniform plan, but only if it complies with the laws of California.

Such a uniform plan, based on California law, deprives Merrill Lynch of the benefits of the laws of the far greater number of states in which the provision is legal and of the right to insist that its personnel who have access to confidential business information or who develop close relation-

ships with customers will not utilize such information or relationships in competition with Merrill Lynch.

The court's decision can be construed as giving Merrill Lynch the alternative of maintaining two plans, one for California and one for the rest of its personnel, national and international. Such a bifurcated plan, aside from any inefficient business considerations, presents the risk to Merrill Lynch, and its employees or former employees such as respondent, of losing favorable tax advantages. The Merrill Lynch plan is qualified under federal tax laws, giving thereby certain favorable tax treatment to Merrill Lynch and its employees. This federal qualification can be lost if the plan discriminates in favor of key management personnel. 26 U.S.C. § 401(a)(4). Forfeitures under the provision in question would increase the vested interests of key management personnel at the expense of non-California employees, arguably resulting in the discrimination forbidden by the federal tax laws.

The character of the plan requires that there be uniformity because it does not admit of diversity of treatment. The extraterritorial effect of application here results in an impermissible burden on interstate commerce. The court indicated Business & Professions Code § 16600 constituted a "strong public policy." Appendix A, p. 10. Whether or not that articulated interest should apply to overcome the desired and equitable uniformity required presents an important legal question for resolution.

4. Resolution of the Issues in This Case Is Important to a Substantial Segment of American Society.

That the issues have a significance transcending the interests of the parties is apparent from the litigation it has spawned. In California, identical lawsuits have been filed against Reynolds & Co., Goodbody & Co., Glore, For-

gan, DuPont & Co., and Harris Upham & Co. who have similar provisions in their profit-sharing plans. Communications have been received from corporate counsel both within and without the state of California concerning the decision below. The importance to the nationwide securities industry is apparent and is an additional basis for granting the writ.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and opinion of the Court of Appeal for the First Appellate District.

Respectfully submitted,

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August 23, 1972.

(Appendices Follow)

Appendix A

In the Court of Appeal of the State of California
First Appellate District, Division Four

Filed—Mar 15 1972

1 Civil 28875
(Sup.Ct.No. 612278)

David Ware, on behalf of himself and all others similarly situated,
Plaintiff and Respondent,

vs.

Merrill Lynch, Pierce, Fenner & Smith, Inc., a corporation,
Defendant and Appellant.

Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. appeals, pursuant to Code of Civil Procedure section 1294, subdivision (a), from order denying petition to order arbitration.

Questions Presented

1. Was there an arbitration agreement?
2. Is the forfeiture provision of the arbitration agreement legal?
3. Does Labor Code section 229 prohibit arbitration in this dispute?

Record

Plaintiff, a former employee of Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter Merrill Lynch), on behalf of himself and other former employees similarly situated, filed this action for declaratory relief and damages.

The gravaman of the complaint involves a provision, Article 11.1, in the Merrill Lynch Profit Sharing Plan for Employees. The complaint seeks (1) a declaration that Article 11.1 is invalid under applicable law (Bus. & Prof. Code, § 16600), and (2) that defendant is obligated to pay to plaintiff the amount of the profit sharing rights which Merrill Lynch claims were forfeited and to which plaintiff claims to be entitled. Merrill Lynch answered and filed a petition for order of arbitration. Plaintiff then filed a motion for order determining that the action is maintainable as a class action, and filed affidavits in support of five individuals moving to have themselves made parties of record as members of the class. The petition for arbitration was denied. The motion for class action and to admit the five persons submitting affidavits as plaintiffs was granted. Merrill Lynch appeals from the order denying arbitration.

Facts

In July 1958 plaintiff Ware became an employee of Merrill Lynch at its San Francisco office as an account executive, remaining such until March 1969 when he voluntarily terminated his employment. He then became an employee of another securities broker, competitive with Merrill Lynch. As a full-time employee of Merrill Lynch he was eligible to participate in its profit sharing plan. From time to time Merrill Lynch made contributions to this plan (employees did not contribute) which were credited to plaintiff's account in the profit sharing trust fund. At the termination of his employment plaintiff's account in the fund was credited with 733 vested units and 1,258 unvested units. When plaintiff became eligible to participate in the plan he was given an explanatory brochure and a copy of the plan.

Article 11.1 of the plan provides:

"A participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation . . . and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation . . . shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960." On April 18, 1969 the Administrative Committee of the plan made a determination that plaintiff had voluntarily terminated his employment with Merrill Lynch and had entered into competitive employment. The committee thereupon caused to be forfeited any and all rights plaintiff had in the plan.

Merrill Lynch is a member of the New York Stock Exchange which is registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. § 78f) which act authorizes the enforcement of rules and bylaws promulgated by said exchange.

Rule 345 of the exchange requires the registration and approval by the exchange of any person employed by a member in the capacity of a registered representative. Plaintiff executed a written application for approval of employment on Form RE-1 of the exchange and was approved and registered. Paragraph 30j of the RE-1 form executed by plaintiff states:

"I agree that any controversy between me and any . . . member organization arising out of my employment on the termination of my employment by and with such . . . member organization shall be settled by arbitration at the instance of any such party in accordance with the Constitution and rules then obtaining of the New York Stock Exchange."

Defendant alleged in its petition for arbitration that all members of the class were subject to the above arbitration provision since each had individually executed the RE-1 form. This is not denied. Plaintiff contends that a class action cannot be arbitrated. Defendant claims that it is not trying to arbitrate a class action but seeking to arbitrate the dispute with the representative of the class under an agreement that also applies to all other members of the class as each has signed a similar agreement. Defendant's contention in this regard is well answered in *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1971) 20 Cal. App. 3d 668, 672, where the identical contract was attacked by a former employee of Merrill Lynch: "Respondent asserts that because he brought his action in behalf of the class of persons affected by the contract arbitration should not be required. But if all employees similarly situated have signed the same arbitration agreement as that which respondent challenges, all are equally bound. If the agreement is valid, it is valid as to all members of the class. It would be inappropriate to allow respondent and the other members of the class he claims to represent to evade the terms of the agreement simply by bringing their action together as a 'class' rather than as individuals."

Section 1281.2 of the Code of Civil Procedure provides in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement." No contention is made that defendant waived its right to arbitration as stated in paragraph 30j of the RE-1 form.

On the record there is no substantial conflict in the facts. Where, as here, the issue is one of law only, findings of facts are not required. (*Allstate Ins. Co. v. Orlando* (1968) 262 Cal. App. 2d 858, 867.) In *Loscalzo v. Federal Mut. Ins. Co.* (1964) 228 Cal. App. 2d 391, where petition for arbitration was denied without the trial court's indicating the basis for denial, and in *Bianco v. Superior Court* (1968) 265 Cal. App. 2d 126, where petition for arbitration was granted without the court's indicating the basis for such order, it was held that the reviewing court must determine the correctness of the ruling from the record, and in doing so must determine if the record supports any of the contentions of the parties opposing the arbitration. We proceed to make such determination.

Plaintiff opposed the granting of the petition for arbitration on three basic grounds: (1) no written agreement to arbitrate existed; (2) the contract was an adhesive one and therefore revoked; (3) the issue in dispute and the legality of the forfeiture provision cannot be arbitrated.

1. *Arbitration agreement.*

The written agreement to arbitrate did exist. (See *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* 20 Cal. App. 3d 668, 671-672.) The RE-1 form expressly referred to the rules and regulations and constitution of the exchange, and contained an express representation by plaintiff to abide by them. At the time the RE-1 form was executed by plaintiff a rule of the exchange (Rule 347(b)) provided for arbitration between members and their employees arising out of the termination of the employment relationship. (2 CCH New York Stock Exchange Guide, par. 2347b.) Moreover, the RE-1 form which plaintiff admitted executing set forth in its entirety the arbitration clause 30j.

Plaintiff's express representation to abide by the exchange rules charged him with the duty of knowing what the rules are. See *Gear v. Webster* (1968) 258 Cal.App.2d 57, where the appellant became a member of an association of realtors whose bylaws required submission to arbitration of controversies between members. "[B]y agreeing to abide by the bylaws appellant was bound to arbitrate her dispute with another member, here, respondent." (258 Cal.App.2d at p. 61.)

In *Larrus v. First National Bank* (1954) 122 Cal.App.2d 884, the plaintiffs opened a bank account and signed signature cards containing a printed statement that they agreed to be governed by the bylaws of the bank. Their attention was not called to the clause in dispute nor were they advised of the bank's rules. The court held the agreement binding. A reasonable person seeking employment in an industry as highly regulated as the securities exchange with knowledge of a registration requirement cannot escape the binding effect of arbitration rules referred to and expressly set forth in the RE-1 form, which he has signed, by claiming lack of knowledge of the rules integrated into the form.

The RE-1 form is a contractual agreement, even though it is headed "Application." In the application plaintiff stated "I have read the Constitution and Rules of the Board of Governors of the New York Stock Exchange and, if approved, I hereby pledge myself to abide by the Constitution and Rules of the Board of Governors . . . as the same have been or shall be from time to time amended, and by all the rules and regulations adopted pursuant to the Constitution and by all practices of the Exchange."

The approval and registration by Merrill Lynch made the application a contract between the parties.

In *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* 20 Cal.App.3d 668, the identical situation arose as

in this case. Frame was a former employee of Merrill Lynch who voluntarily left their employment and entered competitive employment. As did plaintiff here, he filed an action to have the forfeiture provision of his application for employment declared void. The defendant petitioned for an order requiring arbitration of all issues. The petition was denied by the trial court, which action the reviewing court held erroneous. Involved was the identical form of application for employment involved in this action. There, as does plaintiff here, Frame although he admitted signing the application contended that there was no binding agreement between him and Merrill Lynch for arbitration because there was no mutual assent to the arbitration provision as he was unaware of the clause because he did not read it. To this contention the reviewing court answered: "But failure to read a contract before signing is not in itself a reason to refuse its enforcement. (Oakland Bank of Commerce v. Washington (1970) 6 Cal.App.3d 793, 800.)" (*Frame v. Merril Lynch, Pierce, Fenner & Smith, Inc., supra,* at p. 671; *Frederico v. Frick* (1970) 3 Cal.App.3d 872, 875.)

Just as plaintiff does here, Frame contended that Merrill Lynch was not a party to the agreement. The court said: "Respondent claims that appellant cannot enforce the agreement to arbitrate because appellant was not a party to it. The arbitration agreement was indeed contained not in a contract form but in a New York Stock Exchange form, entitled 'APPLICATION FOR APPROVAL OF EMPLOYMENT OF REGISTERED REPRESENTATIVE.' But the form was an indispensable part of the arrangements by which respondent was employed by appellant. The subject matter of the 'application' was the approval of respondent's employment by appellant, the form was witnessed by an officer of appellant, and investigation and substantiation of the fact assertions in the application were entrusted to

appellant. The application was part of the larger transaction by which appellant and respondent entered into a continuing employment relationship. Therefore, the arbitration provision is not unenforceable because of lack of mutuality." (*Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, at pp. 671-672.)

2. *The legality of the forfeiture clause.*

Frame made the same contention in his case as does plaintiff here, concerning clause 1.11: "The profit-sharing plan under which respondent claims benefits contains a provision that an employee who voluntarily terminates his employment and works for a competitor forfeits his rights to benefits under the plan. Respondent contends that the forfeiture provision is unlawful as being in restraint of trade under Business and Professions Code section 16600. In *Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal.2d 239, 242 (42 Cal.Rptr. 107, 398 P.2d 147), the court held invalid under section 16600 a closely analogous provision. In *Muggill* a retired employee went to work for a competitor of his former employer; retirement fund benefits were terminated under a clause similar to the one here in question. We are persuaded that, under *Muggill*, the forfeiture provision is ineffective under California law.

* * * * * * *

". . . Business and Professions Code section 16600 explicitly declares that 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.' The California Supreme Court in *Muggill v. Reuben H. Donnelley Corp., supra*, 62 Cal.2d 239, at page 242, has on closely similar facts held a forfeiture provision to be invalid. We conclude from the California Supreme Court's treatment of the problem that section 16600 does represent a 'strong public

policy' of this state." (*Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* 20 Cal.App.3d at pp. 672, 673.) Thus, it is clear that the forfeiture clause is invalid and cannot be enforced here.

3. *Labor Code section 229.*

Defendant contends that plaintiffs argument regarding Labor Code section 229 was not presented to the trial court and is newly raised on appeal. Therefore it should not be considered. If considered, defendant submits that it was reversible error by the trial court in failing to prepare mandatory findings of fact and conclusions of law.

Defendant's contention that the effect of Labor Code section 229 cannot be considered on appeal is without merit. A legal theory to sustain a judgment may be considered on appeal even though it was not raised in the trial court, as long as it does not raise factual issues not presented to the trial court. (*Allstate Ins. Co. v. Orlando, supra,* 262 Cal. App.2d 858, 867.) Facts sufficient to sustain such theory under Labor Code section 229 were presented to the trial court. Therefore, Labor Code section 229 should be considered in determining the correctness of the trial court's order.

The *Frame* court did not consider the effect of section 229 of the Labor Code on the arbitration agreement. This section provides that "Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained *without regard to the existence of any private agreement to arbitrate.*" (Emphasis added.) Wages are defined in section 200 of the Labor Code as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

No cases have construed section 229 of the Labor Code, but the intent appears quite clear. While the strong public policy of the state favors arbitration (*Federico v. Frick, supra,* 3 Cal.App.3d 872, 875), the intent of the statute is to provide in the first instance a judicial forum where there exists a dispute as to wages. Since the intent is clear, the only determination which must be made is whether the profit sharing benefits constitute wages within Labor Code section 200, *supra.* "[P]ursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation. [Citations.]" (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607.) A bonus, offered as an incentive to attract employees, has been held to be wages. (*Hunter v. Ryan* (1930) 109 Cal.App. 736, 738.) Payments to a health and welfare fund by an employer (*People v. Alves* (1957) 155 Cal.App.2d Supp. 870, 872), payment of insurance premiums by an employer (*Foremost Dairies v. Industrial Acc. Com.* (1965) 237 Cal. App.2d 560, 580), payments to an unemployment insurance fund (*People v. Dennis* (1967) 253 Cal.App.2d Supp. 1075, 1077), and pension plan benefits (*Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 725) are wages within the meaning of the statute. In its legal sense, the word "wage" has been given a broad, general definition so as to include compensation for services rendered without regard to the manner in which such compensation is computed. (*Estate of Hollingsworth* (1940) 37 Cal.App.2d 432, 436.)

In the profit sharing plan in question, it is stated that such employee benefits, a voluntary sharing by Merrill Lynch, etc. of its profits with its employees, is intended not only to reward the employees, but also to provide a nest egg for the future. All contributions to the plan are made

by the employer. The employee's share is determined by the ratio that his compensation bears to the compensation of all eligible employees.

The profit sharing plan is clearly an inducement to employees by a plan through which they benefit financially in proportion to their compensation. Consequently, defendant's contributions to the plan should be considered wages within the meaning of Labor Code sections 200 and 299. Therefore, section 229 must apply to plaintiff's claim, giving him the right to bring his claim in court in spite of any agreement to arbitrate.

"Profit sharing ordinarily signifies the participation of employees with their employer in a given share of the profits of an enterprise by reason of their labor . . . ." (*Durkee v. Welch* (S.D.Cal. 1931) 49 F.2d 339, 341.)

Section 229 of the Labor Code was adopted in 1959 (Stats. 1959, ch. 1939, § 1, p. 4532). The California Arbitration Act was revised in 1961 (Stats. 1961, ch. 461, § 2, p. 1540 [now included in Code Civ. Proc., §§ 1280-1294.2]). The fact that the Legislature has not seen fit to amend or repeal section 229 in the approximately 11 years since the revision of the Arbitration Act precludes any claim that section 229 is no longer in effect.

There is nothing in the Arbitration Act to indicate that the public policy inherent in section 229, namely that an employee cannot be required to arbitrate a claim for wages, which arbitration might not take place in California, has changed in any respect.

We hold that the forfeiture provision of the agreement is illegal and that arbitration will not lie. It therefore becomes unnecessary to consider the other contentions of the parties.

The only issue before us on this appeal is the validity of the trial court's order denying respondent's petition

for arbitration. Any other issues under the pleadings may of course be considered by the trial court.

It should be pointed out that the order making this a class action limits the plaintiffs to plaintiff Ware, the five persons designated as additional plaintiffs, and residents of California who voluntarily left the employ of Merrill Lynch and entered into employment with competitive firms and who were not paid profit sharing units by reason of Article 11.1.

Order affirmed.

Certified for publication.

BRAY, J.*

We concur:

DEVINE, P. J.

RATTIGAN, J.

*Retired Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

Appendix B

New York Stock Exchange Rule 345.

Employees—Registration, Approval, Records, Discipline

Rule 345. (a) No member or member organization shall

(1) permit any person to perform regularly the duties customarily performed by a registered representative, unless such person shall have been registered with and is acceptable to the Exchange, or

(2) employ any registered representative or other person in a nominal position because of the business obtained by such person.

(b) No member corporation shall permit any person to assume the duties of an officer unless such corporation has filed an application with and received the approval of the Exchange.

(c) The Exchange may disapprove the employment of any person.

(d)(1) If the Exchange determines that any employee or prospective employee of a member or member organization (1) has violated any provision of the Constitution or of any rule adopted by the Board of Governors, (2) has violated any of his agreements with the Exchange, (3) has made any misstatement to the Exchange, or (4) has been guilty of (i) conduct inconsistent with just and equitable principles of trade, (ii) acts detrimental to the interest or welfare of the Exchange, or (iii) conduct contrary to an established practice of the Exchange, the Exchange may withhold, suspend or withdraw its approval of his employment by a member or member organization; may fine such employee or prospective employee $5,000 for each such violation, misstatement, or act or omission for which he has been found guilty; and may direct that he be censured. The Exchange shall disclose publicly withdrawals of approval

or suspensions of employees and former employees. The Exchange may in its discretion, disclose publicly censures and fines, censures or fines. The total of the fines which may be imposed upon any employee or prospective employee at any one time shall not exceed $25,000 except as provided in Rule 345(e).

(2) An accusation, charging a registered representative, non-registered employee or prospective employee with having committed a violation shall be in writing; it shall specify the charge or offense with reasonable detail and inform the person charged that he is entitled to request an appearance before a panel of the staff of the department bringing the charges. A copy of the charge or charges shall be served upon the person charged by delivering or by mailing it to him at his office address or at his place of residence. The person charged shall have ten days from the date of such service to answer the same, or such further time as the Exchange may deem proper. The answer and request for an appearance shall be in writing, signed by the person charged and filed with the department bringing the charge. A panel composed of three members of the department shall meet to consider the charge or charges. Notice of this hearing shall be sent to the said person charged; he shall be entitled to be present personally to examine and cross-examine all witnesses produced before said panel and also to present such testimony, defense, explanation or witnesses as he may deem proper. If said person charged should decline, refuse or neglect to request a personal appearance at this hearing, the determination of the panel shall be made on the basis of the charges and the written answer, if any, of the person charged. After hearing all witnesses and the person charged, if he desires to be heard, the panel shall determine whether the person charged is guilty of the offense or offenses. Notice of the finding and

the penalty imposed by the Exchange and that such person may require a review by the Board of Governors in accordance with Rule 345(e), shall be mailed to said registered representative, non-registered employee or prospective employee in the manner hereinbefore provided.

(e) Any present or prospective employee of a member or member organization may require a review by the Board of Governors of any determination and penalty made under this Rule by filing with the Secretary of the Exchange a written demand therefor within 20 days after such determination and penalty has been rendered. As a result of any such review the Board may sustain any determination and penalty imposed, may modify or reverse any such determination, and may increase, decrease or eliminate any such penalty, or impose any penalty, as it deems appropriate. The determination and penalty, if any, as approved by the Board following its review shall be final and conclusive.

(f) If any employee of a member or member organization is suspended or expelled from any other securities exchange or any national securities association, or is suspended or barred from being associated with any member of such exchange or association, or is suspended or barred by any governmental securities agency from dealing in securities or being associated with any broker or dealer in securities, the Exchange may in view of such suspension, expulsion or bar, suspend or withdraw its approval of his employment by a member or member organization, but no such suspension by the Exchange shall commence before or expire after the suspension imposed by such other exchange, association or agency, and no such withdrawal of approval shall be imposed by the Exchange unless such employee has been expelled or barred by such other exchange, association or agency. Nothing in this paragraph (f) shall preclude any proceeding against any employee

under Rule 345(d)(2). In any proceeding under this paragraph (f), the method of procedure required by Rule 345(d)(2) shall not apply, but the employee shall be given not less than ten days notice in writing of a hearing before a panel of the staff of the Exchange to determine whether or not the Exchange should suspend or withdraw, as the case may be, its approval of his employment of a member or member organization, as provided herein. At such hearing, the employee shall be afforded an opportunity to explain why it would be inappropriate for the Exchange to suspend or withdraw its approval of his employment, notwithstanding his suspension, expulsion or bar by such other exchange, association or agency. In the event the employee fails or refuses to appear at such hearing, the Exchange may nevertheless determine the matter and suspend or withdraw its approval of his employment as provided herein. Notice of the Exchange's determination and that such person may require a review by the Board of Governors in accordance with Rule 345(e), shall be mailed to such employee in the manner provided in Rule 345(d)(2).

* * *

New York Stock Exchange Rule 345.17

Agreements.—Each prospective registered representative or officer shall sign the following statements:

(a) "I authorize and request any and all of my former employers and any other person to furnish to the Exchange, or any agent acting on its behalf, any information they may have concerning my credit worthiness, character, ability, business activities, general reputation, mode of living and personal characteristics, together with, in the case of former employers, a history of my employment by them and the reasons for the termination thereof. Moreover, I hereby release each such employer and each such other person from

any and all liability of whatsoever nature by reason of furnishing such information to the Exchange or any agent acting on its behalf.

"Further, I recognize that I will be the subject of an investigative consumer report ordered by the Exchange and that I have the right to request complete and accurate disclosure by the Exchange of the nature and scope of the investigation requested.

(b) I authorize the New York Stock Exchange to make available to any prospective employer, or to any Federal, State or Municipal agency, any information it may have concerning me, and I hereby release the New York Stock Exchange from any and all liability of whatsoever nature by reason of furnishing such information.

(c) I agree that the decision of the New York Stock Exchange as to the results, of any examinations it may require me to take will be accepted by me as final, and that I shall be subject to the penalties provided for under Rule 345(c) of the Board of Governors, as from time to time amended, if, in the opinion of the Exchange, I have

(1) violated any provision of the Constitution or of any rule adopted by the Board of Governors;

(2) violated any of my agreements with the Exchange;

(3) made any misstatements to the Exchange; or

(4) been guilty of (i) conduct inconsistent with just and equitable principles of trade, (ii) acts detrimental to the interest or welfare of the Exchange, or (iii) conduct contrary to an established practice of the Exchange.

(d) I have read the Constitution and Rules of the Board of Governors of the New York Stock Exchange and, if approved, I hereby pledge myself to abide by the Constitution and Rules of the Board of Governors of the New York Stock Exchange as the same have been or shall be from time to time amended, and by all rules and regulations adopted pursuant to the Constitution, and by all practices of the Exchange."

Further, each registered representative, in consideration of the Exchange's approving his application, shall sign the following statements:

(A) "That I will not guarantee to my employer or to any other creditor carrying a customer's account, the payment of the debit balance in such account, without the prior written consent of the Exchange.

(B) That I will not guarantee any customer against loss in his account or in any way represent to any customer that I or my employer will guarantee the customer against such losses.

(C) That I will not take or receive, directly or indirectly, a share in the profits of any customer's account, or share in any losses sustained in any such account.

(D) That I will not make a cash or margin transaction or maintain a cash or margin account in securities or commodities, or have any direct or indirect financial interest in such a transaction or account, except with a member organization or with a bank. I understand and agree that no such transaction may be effected and no such account may be maintained without the prior consent of my employer, and that except for Monthly Investment Plan transactions such employer must receive promptly, directly from the carrying member organization or bank, duplicate copies of all confirmations and statements relating to such transactions or account. I further understand and agree that I shall receive no compensation for commissions or profits earned on any transaction or account in which I have a direct or indirect financial interest, except with the approval of my employer and in accordance with the rules of the Exchange.

(E) That I will not rebate, directly or indirectly, to any person, firm or corporation any part of the compensation I receive as a registered employee, and I will not pay such compensation, or any part thereof, directly or indirectly, to any person, firm or corporation, as a

bonus, commission, fee or other consideration for business sought or procured for me or for any member or member organization of the Exchange.

(F) That at any time, upon the request of the Department of Member Firms, or of any Committee or other Department of the New York Stock Exchange, I will appear before such Committee or Department and give evidence upon any subject under investigation by any such Committee or Department, and that I will produce, upon request of the Exchange, all of my records or documents relative to any inquiry being made by the Exchange.

(G) I understand that any changes in compensation in any form, or additional compensation in any form, may be subject to disapproval by the New York Stock Exchange, and that I may not be compensated for business done by or through my employer after the termination of my employment except as may be permitted by the Exchange.

(H) I agree that I will not take, accept, or receive, directly or indirectly, from any person, firm, corporation or association, other than my employer, compensation of any nature, as a bonus, commission, fee, gratuity or other consideration, in connection with any securities, commodities or insurance transaction or transactions, except with the prior written consent of the Exchange.

(I) I will notify my member organization and the Department of Member Firms promptly if, during the tenure of my employment I become the subject of: any investigation or proceeding by any governmental or securities or insurance industry self-regulatory body; a refusal of registration, injunction, censure, suspension, expulsion or other disciplinary action by any governmental or securities or insurance industry self-regulatory body; a major complaint by a customer of a member organization or by a broker-dealer in securities; a disciplinary action by a member organization; any litigation or arbitration alleging my violation of

any agreement with or provision of any securities industry self-regulatory body's constitution, by-laws, or rules or any securities or insurance law or regulation; or any bankruptcy or contempt proceeding, cease and desist order, injunction or civil judgment as party defendant; or any arrest, summons, arraignment, indictment, or conviction for a criminal offense (other than minor traffic violations); or any material allegation that I have conducted myself in a way which may be inconsistent with just and equitable principles of trade, or detrimental to the interest and welfare of the Exchange, or contrary to an established practice of the Exchange; or if I violate any provision of the Exchange Constitution or of any rule adopted by the Board of Governors or of any securities or insurance law or regulation or of any agreement with the Exchange.

(J) I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and rules then obtaining of the New York Stock Exchange."

(K) If the Exchange, during the period of 90 days immediately following receipt by the Exchange of written notice of the termination of my employment gives me written notice that the Exchange is making inquiry into any specified matter or matters occurring prior to termination of such employment, I agree that I will thereafter, comply with any request of the Exchange for me to appear and testify, submit records, respond to written requests, attend hearings, and accept disciplinary charges or penalties with respect to the matter or matters specified in such notice in every respect in conformance with the Constitution, Rules and practices of the Exchange in the same manner and to the same extent as required to do if I had remained

an employee. If I refuse to accept such written notice or, having been given such notice, refuse or fail to comply with any such request of the Exchange, I agree that such refusal or failure may, in the discretion of the Exchange, act as a bar to future Exchange approval of my employment until such time as the Exchange has completed investigation into the matter or matters specified in such notice; has determined a penalty, if any, to be imposed against me; and until the penalty, if any, has been carried out.

New York Stock Exchange Rule 347.

Compensation

Rule 347. (a) Pursuant to Section 1 of Article XV of the Constitution [¶ 1701], registered representatives may be compensated as follows:

(1) registered representatives—on a salary or a commission basis,

(2) branch office managers—on a salary or a commission basis: also, with the prior approval of the Exchange, they may receive a percentage of the net profit of the branch office,

(3) a registered representative who is also head of a department of the organization—may, with prior approval of the Exchange, receive a percentage of the net profit of his department, and

(4) bonuses—registered representatives may participate, with the prior approval of the Exchange, in bonus distributions.

(b) Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

Appendix C

In the Court of Appeal of the State of California

First Appellate District, Division Four

Filed Oct 19 1971

1/Civil 28135

(Sup.Ct.No. P 16598)

Ronald Frame, a former employee of Merrill Lynch, Pierce, Fenner & Smith Incorporated, on behalf of himself and all other former employees similarly situated,
Plaintiff and Respondent,

vs.

Merrill Lynch, Pierce, Fenner & Smith Incorporated, a corporation,
Defendant and Appellant.

Merrill Lynch, Pierce, Fenner & Smith, Inc. appeals from an order denying its petition for arbitration of issues raised in an action brought by respondent Ronald Frame.

Respondent, a former employee of appellant, commenced an action seeking a determination that a portion of a purported agreement between appellant and respondent, which provides for forfeiture of profit-sharing rights by any employee of appellant who resigns and then engages in competition with appellant, is void as a restraint on competition condemned by Business and Professions Code section 16600. Appellant pleaded as a defense that respondent had executed an agreement to arbitrate any dispute. Concurrently,

appellant petitioned the court for an order requiring arbitration of all issues (see Code Civ. Proc., § 1281.2). The trial court denied appellant's petition for arbitration, upon the determination (made on affidavits) that "there is no binding agreement between Ronald Frame and defendant to arbitrate this controversy." The present appeal followed. We have concluded that it was error to withhold giving effect to the arbitration clause.

We note preliminarily that the order denying arbitration was based on no findings of fact or conclusions of law other than the recital that "there is no binding agreement . . . to arbitrate this controversy." Although Code of Civil Procedure section 1291 might appear to create an absolute requirement of findings to support such an order, it has been held that the requirement of section 1291 must be read as conforming to the general rules governing findings of fact in civil actions. (*Allstate Ins. Co. v. Orlando* (1968) 262 Cal. App.2d 858, 867.) Here neither party requested findings of fact or conclusions of law; therefore the court's failure to make findings was not error. (Code Civ. Proc., § 632.) Therefore, the order denying arbitration is to be upheld if the record supports it on any theory.

It was a condition of respondent's employment that he be approved by the New York Stock Exchange, of which appellant is a member. Respondent admits that he signed a stock exchange application form which contained an agreement to arbitrate "any controversy between me and any member or member organization arising out of my employment or the termination of my employment by and with such member or member organization . . ." Respondent contends that the agreement to arbitrate was unenforceable because there was no mutual assent to that provision. Specifically he contends that he was unaware of the clause because he did not read it. But failure to read a contract before signing

is not in itself a reason to refuse its enforcement. (*Oakland Bank of Commerce v. Washington* (1970) 6 Cal.App.3d 793, 800.)

Respondent claims that appellant cannot enforce the agreement to arbitrate because appellant was not a party to it. The arbitration agreement was indeed contained not in a contract form but in a New York Stock Exchange form, entitled "APPLICATION FOR APPROVAL OF EMPLOYMENT OF REGISTERED REPRESENTATIVE." But the form was an indispensable part of the arrangements by which respondent was employed by appellant. The subject matter of the "application" was the approval of respondent's employment by appellant, the form was witnessed by an officer of appellant, and investigation and substantiation of the fact assertions in the application were entrusted to appellant. The application was part of the larger transaction by which appellant and respondent entered into a continuing employment relationship. Therefore, the arbitration provision is not unenforceable because of lack of mutuality.

Respondent next attempts to invoke the doctrine of adhesion contracts to invalidate the arbitration clause. It is true that where the bargaining strength of contracting parties is unequal a contractual provision may be construed to give effect to the reasonable expectations of the weaker party when necessary to avoid injury or unfair imposition which it is shown would be the result of giving literal effect to the terms of the contract. (See Comment (1967) 1 U.S.F. L.Rev. 306.) Here, assuming that the contract was adhesory, it is not shown that arbitration would be contrary to the reasonable expectations of any party or that any loss or unfair imposition would result. Therefore no basis exists in the present case for using the doctrine of adhesion contracts to avoid arbitration. (*Cf. Federico v. Frick* (1970) 3 Cal. App.3d 872, 875.)

Respondent asserts that because he brought his action in behalf of the class of persons affected by the contract arbitration should not be required. But if all employees similarly situated have signed the same arbitration agreement as that which respondent challenges, all are equally bound. If the agreement is valid, it is valid as to all members of the class. It would be inappropriate to allow respondent and the other members of the class he claims to represent to evade the terms of the agreement simply by bringing their action together as a "class" rather than as individuals.

The profit-sharing plan under which respondent claims benefits contains a provision that an employee who voluntarily terminates his employment and works for a competitor forfeits his right to benefits under the plan.[1] Respondent contends that the forfeiture provision is unlawful as being in restraint of trade under Business and Professions Code section 16600. In *Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal.2d 239, 242, the court held invalid under section 16600 a closely analogous provision. In *Muggill* a retired employee went to work for a competitor of his former employer; retirement fund benefits were terminated under a clause similar to the one here in question. We are persuaded that, under *Muggill*, the forfeiture provision is ineffective under California law. Appellant points out, however, that the contract contains an express provision that the rights of the parties will be governed by the law of New York. It is conceded that under New York law the forfeiture provision is valid; it would not be treated as

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1. "11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960."

being in restraint of trade as it would be under California law. (See *Kristi v. Whelan* (1957) 164 N.Y.S.2d 239, aff'd 5 N.Y.2d 807, 809.)

The next question is whether the provision specifying New York law is valid. As a general rule, it is said that contracting parties may by agreement specify what law is to control their contract if "enforcement of the contract by a local court in accordance with the foreign law agreed to be controlling does not result in an evasion of the settled public policy or a statute of the forum protecting its citizens." (11 Cal.Jur.2d, § 55, p. 138.)

We recognize that the choice-of-law question is not foreclosed by the existence of an applicable California statute where New York State has substantial contacts with the transaction and the parties, if no attempt to evade California law appears. But an agreement designating applicable law will not be given effect if it would violate a strong California public policy. (*Ury v. Jewelers Acceptance Corp.* (1964) 227 Cal.App.2d 11, 20; *cf. People v. Globe & Rutgers Fire Ins. Co.* (1950) 96 Cal.App.2d 571, 575 [upholding contract provisions designating applicable law].) Here Business and Professions Code section 16600 explicitly declares that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The California Supreme Court in *Muggill v. Reuben H. Donnelley Corp., supra,* 62 Cal.2d 239, at 242, has on closely similar facts held a forfeiture provision to be invalid. We conclude from the California Supreme Court's treatment of the problem that section 16600 does represent a "strong public policy" of this state. Therefore the agreement for application of New York law must not be allowed to defeat that policy.

It does not follow, however, that the entire contract was necessarily unlawful. Issues of law and fact may emerge

as to the severability of the unlawful penalty provision. A latent question exists as to whether the agreements of the parties may be construed as applying only to such permissible subjects of restraint as breaches of confidence and misappropriation of trade secrets. Other questions may be raised as to the time and circumstances of respondent's employment and the amount of any benefits earned and remaining unpaid. All of these matters, whether they involve questions of law or questions of fact, are in the first instance properly subject to arbitration. (*In re Frick* (1933) 130 Cal.App. 290, 292.) If the award wrongly gives effect to an unlawful contractual provision, it will be subject to attack on the hearing of any petition for confirmation. (See *Loving & Evans v. Blick* (1949) 33 Cal.2d 603.)

The order denying arbitration is reversed.

CHRISTIAN, J.

We concur:

DEVINE, P. J.

DAVID, J.*

*Assigned by the Chairman of the Judicial Council.